

2011 ETHICS SEMINAR

JUNE 17, 2011

Maricopa County Board of Supervisors Auditorium
Phoenix, Arizona



PROSECUTORIAL MISCONDUCT IN ARIZONA: CASES, NEW DISCIPLINE SYSTEM & MORE

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Distributed by:

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PROSECUTORIAL MISCONDUCT IN ARIZONA: CASES, NEW DISCIPLINE SYSTEM & MORE

APAAC – JUNE 17, 2011

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Topics for Today

- Highlights of new discipline system
- State Bar – what are they prosecuting now?
- Misconduct in the courtroom - dishonesty
- Prosecutor misconduct

Four major changes
Whole new focus

The "Colorado Model"

- Supreme Court's Discipline Task Force
- Best practices from Colorado system
- Integrate 14 of Colorado's "best practices"
- New rules took effect January 2011

State Bar Intake Office

- Court's Order: - Goal of new system
- Intake - divert more cases.
- Goal is to reduce processing time for cases & number of cases investigated.
- More serious matters to receive more attention.

Four Major Changes in New Discipline System

- Intake
- Probable Cause
- Trials
- Appeals

Bar Complaints (charges)

- Will now be received in any form
- By telephone ok
- Writing no longer required
- State Bar's website: can now e-file a complaint.

SBA communicate with parties

- frequent & early communication
- with respondents and complainants
- must provide detailed written explanation of disposition, including reason(s) for dismissal

Shift in Resources: New System

	Old System	New System
Total # bar counsel	15	15
Intake Lawyers	3	5
Lawyer Regulation Prosecutors	12	10
Total # investigators	2	4
Intake investigators	0*	0*
Lawyer Regulation investigators	2	4

State Bar Prosecutions

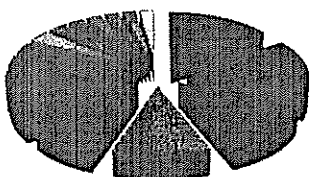
What kinds of cases?
What kinds of respondent lawyers?
What kinds of sanctions?

2010 - Lawyer Discipline

- 3871 total inquiries
- 1459 phone call only
- 2412 written charges
- 2869 closed at intake
- 871 referred to the LRO for "screening investigation"

Most common types of misconduct

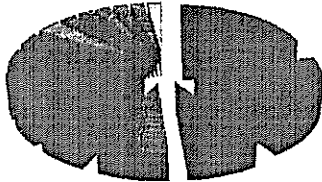
State Bar 2010 Discipline Report



- communication 14%
- Diligence 14%
- scope 10 4%
- conduct prejudicial to the administration of justice 10%
- fees 7 6%
- dishonesty 6%
- competence 4%
- withdrawing 3%
- conflicts 3%
- lies to court 3%
- frivolous case 2 6%

Most Common Areas of Practice

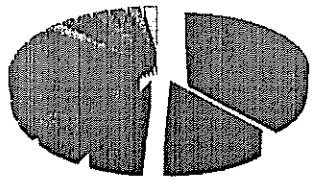
State Bar 2009 Discipline Report



- Criminal law 18.3%
- Family law 18.3%
- Pl med mal 7.5%
- Civil 7.5%
- Commercial 5.6%
- Estate probate 5.2%
- Trust account 5%
- Real prop HOA 4.7%
- Bankruptcy 3.6%
- Collections 3.4%
- Torts 2.4%

Most Common Areas of Practice

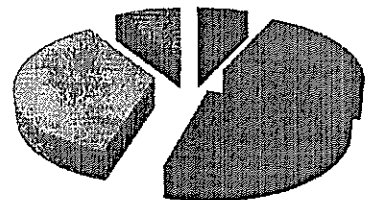
State Bar 2010 Discipline Report



- Criminal law 35.5%
- Family law 11.5%
- Pl med mal 6%
- Civil 6%
- Collections 4%
- Real prop/HOA 4%
- Bankruptcy 4%
- Estate probate 4%
- Trust account 3%
- Personal conduct 2.5%
- Immigration 2%

2010 Lawyers Disciplined

2010 State Bar Discipline Report



- Disbarred 7
- Suspended 23
- Reprimand 24
- Admonition 36
- Probation 9

Dishonesty in the Courtroom

The fast track for losing your license

Dishonest conduct by the #s

- Supreme Court has taken discretionary review of the 17 lawyer discipline cases since 1997
- 17 cases in 14 years
- 9 involve dishonest conduct in the courtroom
- More than 50%
- 3 involve prosecutors
- Almost 20%

Dishonesty in the Courtroom

Case name	Type of lawyer	Citation
In re Alcorn & Feola	Civil - PI	202 Ariz. 03
In re Mook	Civil - PI	202 Ariz. 02
In re Peasley	Criminal prosecutor	208 Ariz. 27
In re Zawada	Criminal prosecutor	208 Ariz. 232
In re Daab	Criminal prosecutor	212 Ariz. 221
In re Duffy	Criminal prosecutor	SB 08-0099

Dishonesty rules

- ER 3.3
- ER 4.1
- ER 8.4(c)

Alcorn & Feola, 202 Ariz. 62

- Civil case – failure to disclose: dishonesty
- 2 Ls rep dr. in med mal case v. dr. & hospital.
- Hospital's MSJ granted, appeal pending.
- Ls entered into confidential agreement with plaintiff to conduct a sham trial to "educate" the judge re appeal of MSJ in case against hospital
- failed to disclose to judge & jury. Deceived judge about it when judge made inquiries on record

Alcorn & Feola - sanction

- Disciplinary Commission = 30 day suspension
- Supreme Court took *sua sponte* review
- Sup Ct Sanction = 6 month suspension
- No reinstatement required
- Mitigation: Ls sought ethics advice and followed it (though the advice was bad)

How *does* the bar and court decide what sanction to impose?



How *does* the bar decide what sanction to impose?

ABA Standards for Imposing Lawyer Discipline

- 1. Duty violated
- 2. Lawyer's mental state
- 3. Injury
- 4. Aggravating & Mitigating Factors

Moak, 205 Ariz. 351

- Civil case - failure to disclose/ dishonesty
- L represented C in 2 separate cases arising out of 2 accidents, 3 years apart
- Failed to disclose in case re: accident #1 the injuries C received in accident #2
- Failed to distinguish appropriately the injuries C received in accident # 2 from those in accident #1

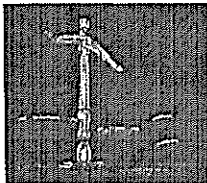
Moak, 205 Ariz. 351

- Lawyer's conduct at trial
- C exhibits tremors throughout the trial; caused by accident #2
- C testifies that all of his injuries relate to accident #1
- Closing, L emphasizes brain injury and effects
- Jury award = \$800,000

Moak - sanction

- Disciplinary Commission: 6 month suspension,
- Supreme Court took *sua sponte* review
- Issue for Court was whether "rehabilitation" was necessary – Court ruled it was.
- Sup Ct sanction: 6 month and one day, requiring reinstatement

Reinstatement: what's required



Arroita, 208 Ariz. 509

- For reinstatement L must show "rehabilitation"
- Burden of proof = clear & convincing evidence
- Court "L must affirmatively show he has overcome those weaknesses that produced his earlier misconduct, i.e. whether he has been rehabilitated".

Prosecutor Misconduct

Zawada, 208 Ariz. 232

- Def's first degree murder conviction reversed based on lawyer's misconduct, double jeopardy
- Zawada's misconduct:
 - appealing to fear of jury if def not convicted
 - disrespect and prejudice re: mental health experts, harassment and insults during cross examination
 - repeated improper argument to the jury

Zawada - sanction

- Hearing Officer = Reprimand 6 mo. probation
- Disciplinary Commission = Censure, no probation, added MAP referral
- Sup Ct = *sua sponte* review - 6 mo. + 1 day suspension, requiring reinstatement

Peasley, 208 Ariz. 27

- Prosecutor lied and used false testimony to convict 3 defendants in first degree murder case
- Conduct repeated in 2 separate trials, 4 years apart – defs sentenced to death
- One def. acquitted when misconduct came to light; other def.'s conviction dismissed with prejudice based on double jeopardy, due to prosecutor's egregious misconduct.

Peasley - sanction

- Hearing Officer = 60 day suspension
- While HO recommendation pending, Sup Ct issued opinion in *State v. Minnitt*
- Disciplinary Commission = disbarment
- Supreme Court agreed with Disciplinary Commission, and disbarred the prosecutor

Formal Cases – New system

- ▢ Trials - three-person panels
 - ▢ Presiding Disciplinary judge
 - ▢ Volunteer attorney
 - ▢ Volunteer public member

Formal Cases – New system

- ▢ Hearing Panel has authority to impose final sanctions, including disbarment
- ▢ All decisions final, unless appealed
- ▢ No intermediate review (DC gone)
- ▢ Direct appeal to Supreme Court

Dean, 212 Ariz. 221

- ▢ Prosecutor & judge had romantic relationship
- ▢ Judge regularly presided over felony cases in which prosecutor appeared
- ▢ During relationship prosecutor appeared in court before judge 485 times.
- ▢ SBA investigation: prosecutor denied the relationship. Case dismissed
- ▢ H videotaped them: resubmitted to SBA

Dean - sanction

- Hearing officer = 6 month suspension
- Disciplinary Commission = 1 year suspension
- Supreme Court took review
- Issue for Court concerned the discipline the judge received, "proportionality"
- Sup Ct sanction = 6 month suspension

In re Abrams': JC 11-0001

- CJC stipulated resolution: censure
- SBA recommendation: multiyear suspension
- Supreme Court Order 05-25-11: censured as a judge. 2 year suspension as a lawyer
- Sup Ct Opinion: pending

Duffy, SB 09-0099

- 4 month capital murder trial
- Prosecutor violated court orders, made improper arguments; def. motions for mistrial
- Trial court denied def. motions, held arguments didn't deprive def. of fair trial
- Trial court filed bar charge

Duffy - sanction

- Hearing Officer = 9 violations: 3 in opening, 1 in closing, 5 during trial
- Hearing Officer = 30 day suspension, 1 year probation, 15 hours CLE (10 in trial ethics)
- Disciplinary Commission = 6-2 vote: same (dissenting opinion filed)
- Supreme Court = declined review, same sanction

Duffy - dissent

- Hearing Officer mistaken re: L's mental state
- Prosecutors errors in long, heated jury trial do not warrant more than a censure

Arizona – public & published

SANCTION	Public	Magazine & press release	Website
Intake dismissal	YES - 6 mo	NO	NO
Screened dismissal	YES - 6 mo	NO	NO
Diversion	NO	NO	NO
Probation	YES	NO	YES - 5yrs
Admonition	YES	NO	NO
Admonition with Probation	YES	NO	YES - 5yrs
Reprimand/Susp/Disbarment	YES	YES	YES - forever

AZ vs. CO –what is public

	ARIZONA	COLORADO
Dismissal	Public for 6 months	Private
Diversion	Private	Private
Probation	Public (& published 5yr)	Private
Admonition	Public	Private
Admonition with prob.	Public (& published 5yr)	Private
Reprimand and up	Public (& published →)	Public (& published →)

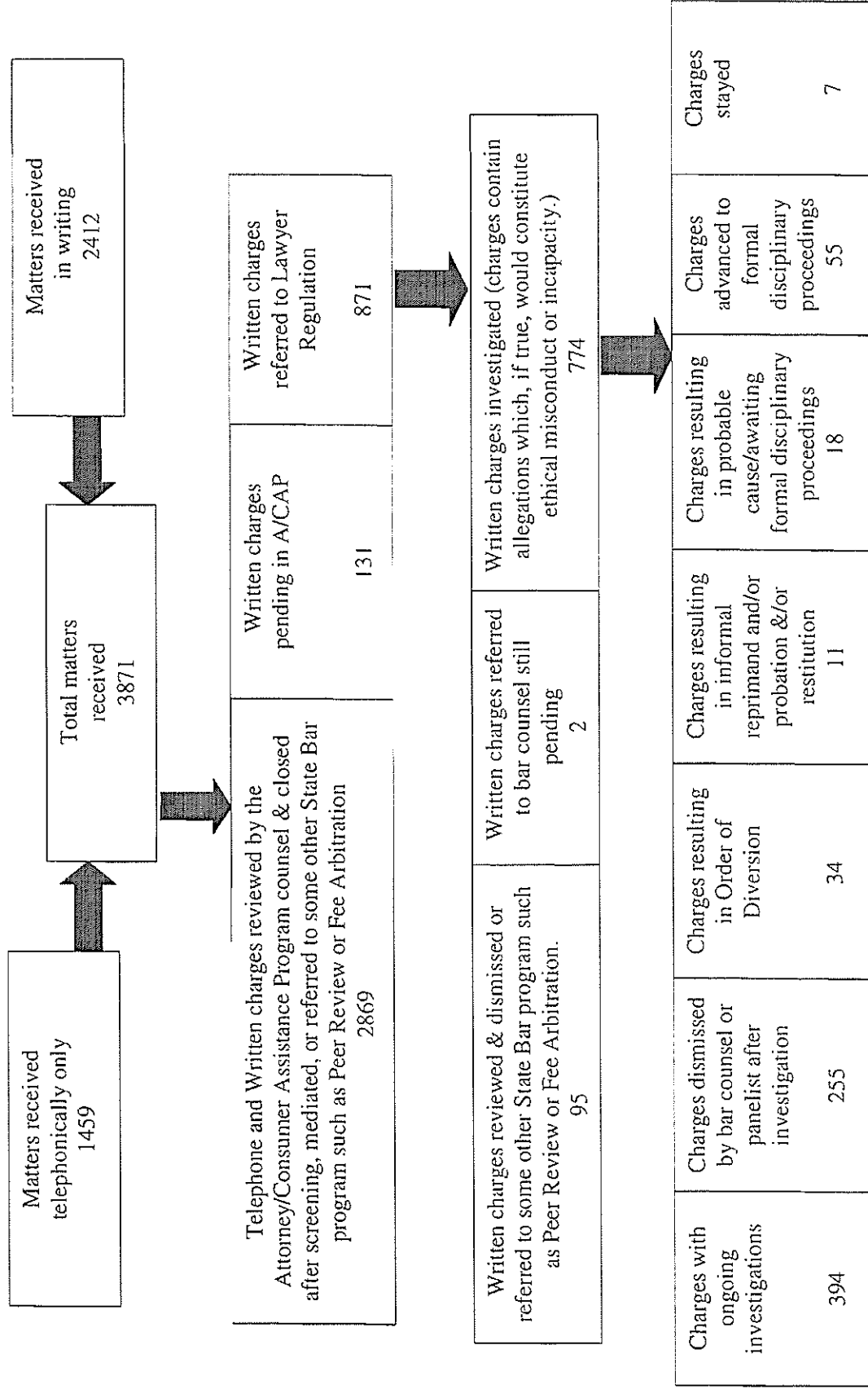
Thank you for coming!!!

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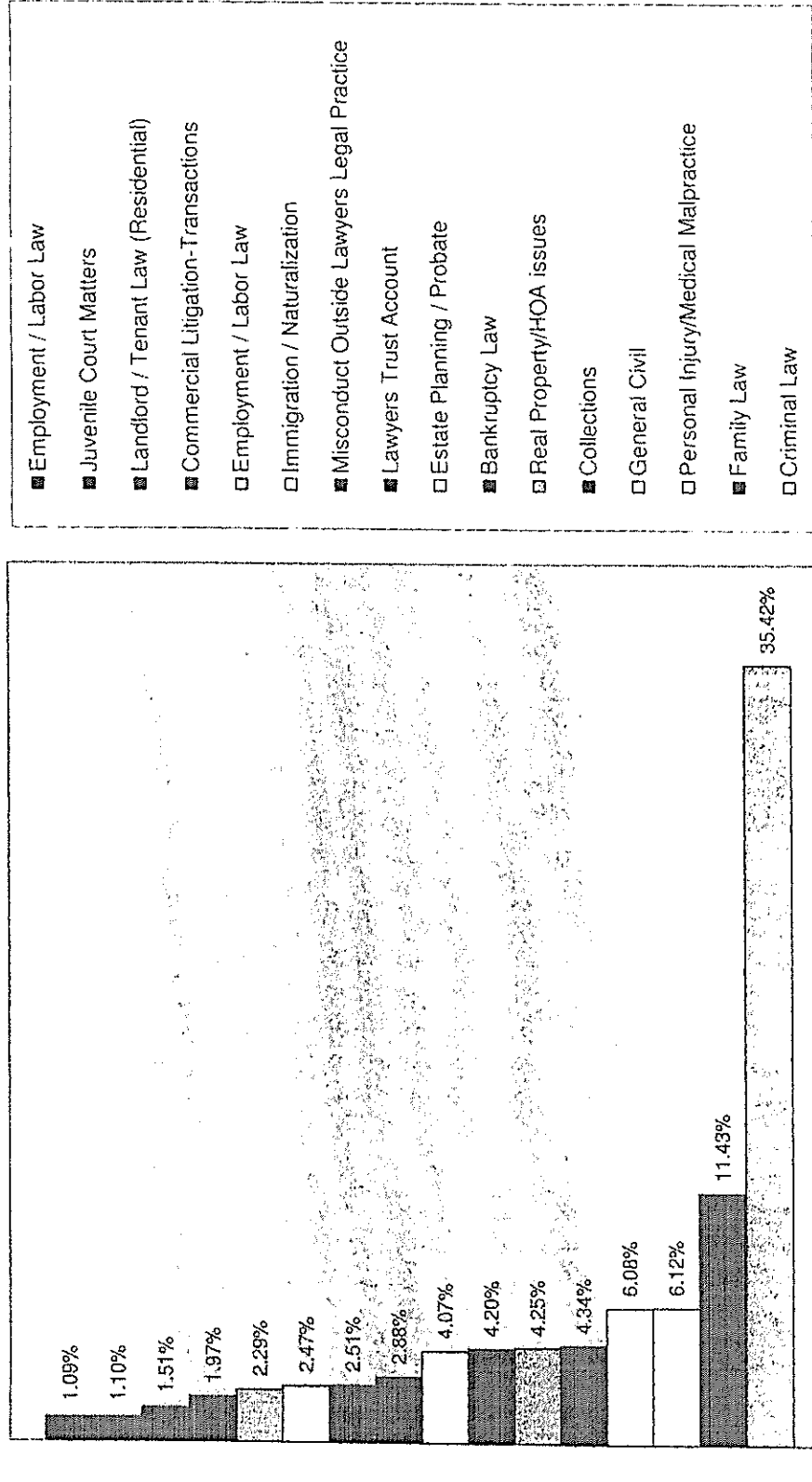
STATUS OF MATTERS RECEIVED IN 2010 **As of 12/31/2010**

Conservatorships
opened in 2010 - 3

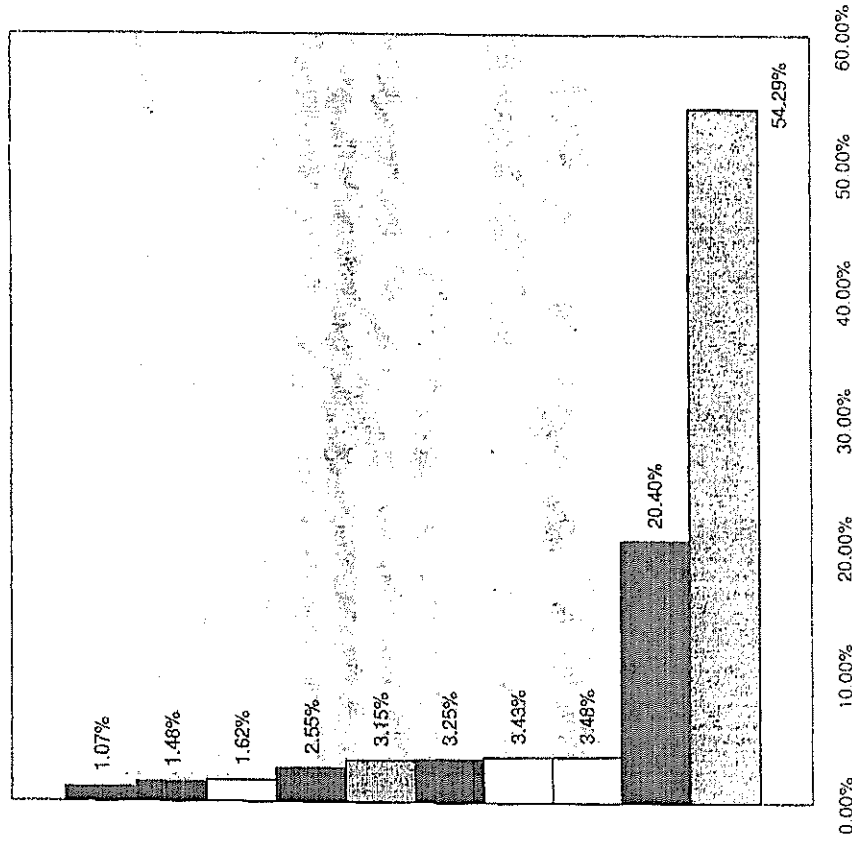




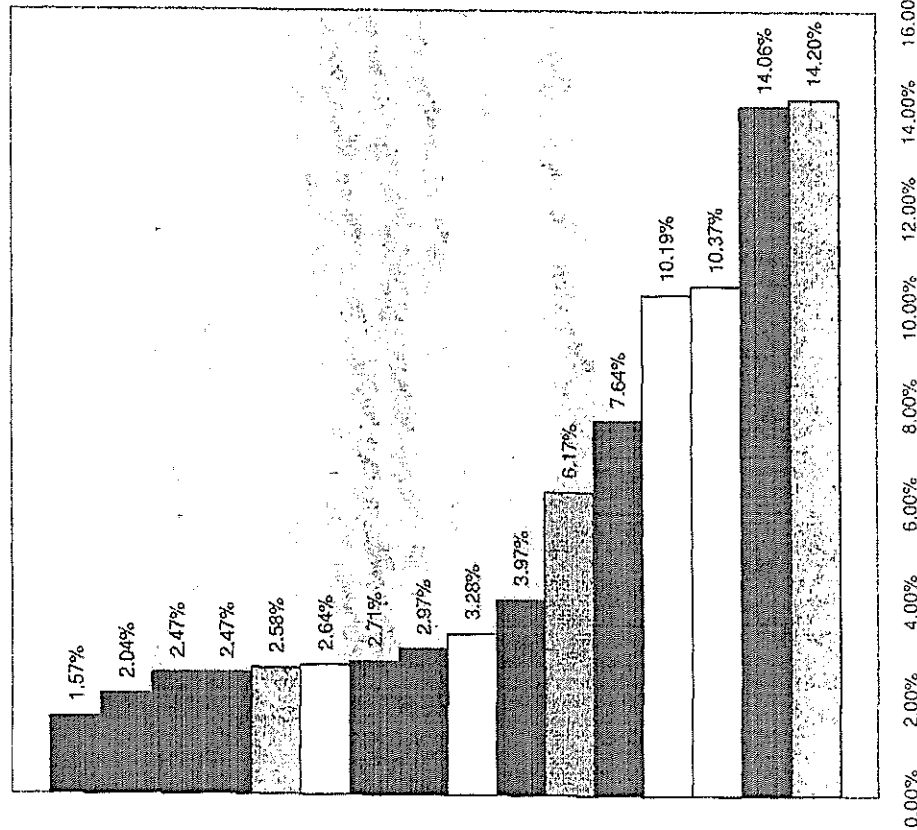
Most Common Area of Practice



Most Common Identity of Complainant



Most Common Alleged Misconduct



- ☒ Failing to Expedite Litigation ER 3.2
- ☒ Truthfulness in Statements to Others ER 4.1
- ☒ Unfairness to Opposing Party ER 3.4
- ☒ Safekeeping Client Property - not TA Issues ER 1.15
- ☐ Professionalism ER 41(g)
- ☐ Non-Meritorious Contentions in Legal Proceedings ER 3.1
- ☒ Lack of Candor to Court or other Adjudicative Body ER 3.3
- ☒ Conflict of Interest ER 1.7, ER 1.8, ER 1.9
- ☐ Failing at Obligations ER 1.16
- ☒ Competence ER 1.1
- ☐ Dishonesty-Fraud-Deceit or Misrepresentation ER 8.4(c)
- ☒ Fees ER 1.5, ER 1.15, Rules 43 and 44
- ☐ Conduct Prejudicial to the Admin of Justice ER 8.4(d)
- ☐ Lack of Compliance with Client Directions ER 1.2
- ☒ Diligence in Representing a Client ER 1.3
- ☐ Communication with a Client ER 1.4